STATE OF MICHIGAN
IN THE SUPREME COURT

BOARD OF TRUSTEES OF THE CITY OF PONTIAC POLICE AND FIRE RETIREE PREFUNDED GROUP HEALTH AND INSURANCE TRUST,

Plaintiffs/Appellees,

v.

CITY OF PONTIAC, Michigan,

Defendant/Appellant.

Supreme Court No. 154745

Court of Appeals No. 316418

Oakland County Circuit Court
Case No. 2012-128625-CZ

DEFENDANT/APPELLANT'S SUPPLEMENTAL BRIEF FILED PURSUANT TO THIS COURT'S JUNE 9 ORDER

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases **Page**

Statutes and Court Rules

Treatises and Other Publications

INTRODUCTION

On June 9, 2017, this Court issued the following Order:

> The parties shall file supplemental briefs within 42 days of the date of this order addressing: (1) whether the Court of Appeals correctly concluded that the principles from *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26 (2014), apply to the analysis of the Emergency Manager's Executive Order 225; and that (2) the retroactive application of EO 225 to extinguish the defendant city's accrued but unpaid contribution to the trust for the 2011-2012 fiscal year was impermissible under *LaFontaine;* and (3) if not, whether EO 225 constitutes an impermissible retroactive modification of the 2011-2012 fiscal year contribution under Const 1963, art 9, § 24. The parties should not submit mere restatements of their application papers.

1. AN EMERGENCY MANAGER'S ORDER IS NOT SUBJECT TO THE *LAFONTAINE* TEST BECAUSE IT IS NOT LEGISLATION

Lafontaine addressed when "laws" will be given retroactive effect. *Lafontaine* did not address an Emergency Manager's Order modifying a specific contract. In this case Plaintiff seeks to elevate an alleged breach of contract into a legislative action. For the reasons explained below, *Lafontaine* does not apply to the government action involved in this lawsuit.

A "law" is defined as "the principles and regulations established by a government or other authority and applicable to a people, whether by legislation or by custom enforced by judicial decision." *Random House Webster's College Dictionary* (2000). By its very essence, a "law" is of a general character and of general

applicability. This is different than what we have in this case. In fact, in cases relating to the Contract Clause, the United States Supreme Court has explained that legislative action does not include the acts of executive officers. *New Orleans Waterworks Co v Louisiana Sugar-Ref Co*, 125 US 18; 8 S Ct 741; 31 L Ed 607 (1888); *see also Smith v Sorensen*, 748 F2d 427 (CA 8 1984).

In the case most factually similar to the instant action, the United States District Court for the Eastern District of Pennsylvania found that a resolution passed by the Southeastern Pennsylvania Transportation Authority ("SEPTA") that modified an employee benefit plan did not constitute legislative action. *Transp Workers Union of Am, Local 290 v SE Pennsylvania Trans Auth*, No. CIV. A. 96-0814, 1996 WL 420826 (ED Pa July 25, 1996).[1] In *SEPTA*, the Board approved a resolution which amended the retirement plan for supervisory, administrative, and management employees (the "SAM plan"), and required enrolled employees, for the first time, to contribute a percentage of their future earnings to the SAM plan. *Id.* At *4-5. Plaintiff filed suit alleging, inter alia, that the resolution modifying the SAM plan violated the Contract Clause of the United States Constitution. *Id.* At *2. The court granted summary judgment in favor of SEPTA and the SAM Plan, finding that the resolution did not constitute a “law” for purposes of applying the Contract Clause. In its ruling,

1 The City is cognizant of the recent amendment to MCR 7.215 regarding the citation of unpublished opinions. Given the scarcity of analogous cases, the City believes the court’s analysis is persuasive and useful to this matter.

the court defined "legislative power" as the lawmaking power of a legislative body involving actions that relate to subjects of permanent or general character. *Id.* At *10 (citing Black's Law Dictionary 900 (6th ed. 1990)). The resolution at issue related only to the subject of employee benefits which extended to SEPTA employees who were members of SEPTA's SAM Plan. *Id.* At *15. Failing to relate to subjects of "permanent or general character," the resolution "did not possess the characteristics of a law of general application." *Id.* At *14-15 (citing *Contemporary Music Group, Inc v Chicago Park Dist*, 343 F Supp 505, 508 (ND Ill 1972)). Moreover, the resolution was not enforced against the public, unlike a resolution that would relate to SEPTA's operation of the transit system. *Id.* At *16. **It related only to SEPTA's pension plan, and affected only those participating in the plan.** *Id. See also Montauk Bus Co, Inc v Utica City Sch Dist*, 30 F Supp 2d 313 (NDNY 1998) (denying Contract Clause claim because the school district's actions relating to bus contract were not legislative acts); *see also Rivera-Nazario v Corporacion del Fondo del Seguro del Estado*, No. CIV. 14-1533 JAG, 2015 WL 5254417, at *16 (DPR September 9, 2015)(same); *Hays v Port of Seattle*, 251 US 233; 40 S Ct 125; 64 L Ed 243 (1920)(holding that legislative action does not encompass claims that a state, or one of its subdivisions or agencies, has breached or repudiated a contract with another person).

In the present case, the Emergency Manager issued an Order relating to a specific contract; he did not pass any "law" of general applicability relating to subjects of a general character. As such, for purposes of *Lafontaine*, EO 225 is not a "law."

2. IF *LAFONTAINE* APPLIED TO EO 225, EO 225 IS STILL PROPERLY RETROACTIVE

There is no general prohibition on retroactive laws. However, as the Court explained, the legislature needs to "make its intentions clear when it seeks to pass a law with retroactive effect." *Lafontaine* at 85. To aid lower courts, this Court outlined a framework for determining whether a "law" should be given retroactive effect. This framework provides:

> In determining whether a law has retroactive effect, we keep four principles in mind. First, we consider whether there is specific language providing for retroactive application. Second, in some situations, a statute is not regarded as operating retroactively merely because it relates to an antecedent event. Third, in determining retroactivity, we must keep in mind that retroactive laws impair vested rights acquired under existing laws or create new obligations or duties with respect to transactions or considerations already past. Finally, a remedial or procedural act not affecting vested rights may be given retroactive effect where the injury or claim is antecedent to the enactment of the statute. [underling added.]

a. *This Court Already Held that EO 225, By Its Express Terms, Applied Retroactively and this Holding Should Be Dispositive*

If EO 225 is a "law," which it isn't, it would be deemed properly retroactive under *Lafontaine*. Under *Lafontaine*, a law is applied retroactively if "there is specific

language providing for retroactive application." In fact, this Court's conclusion in *Lafontaine* held:

> Because nothing in the language of the 2010 Amendment evinces the Legislature's intent that Amendment apply retroactively, we decline to give it retroactive effect.

LaFontaine, supra at 88. As such, the dispositive question is simply: Did the Emergency Manager intend to apply EO 225 retroactively or, in other words, to presently owed contributions? This Court has already answered this question affirmatively, which should have been dispositive below.

"The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue." *KBD & Assoc, Inc v Great Lakes Foam Techs, Inc*, 295 Mich App 666, 679; 816 NW2d 464 (2012). Because this Court held that EO 225 "clearly states" that it applies to "**already accrued, but unpaid obligations [retroactive] and future obligations [prospective]**," the Court of Appeals erred when it found that EO 225 was not sufficiently clear.

Not only does EO 225 expressly apply to presently owed obligations, Public Act 4 also authorized the Emergency Manager to modify or terminate existing, vested contracts. For example, MCL 141.1519 provided the Emergency manager the following powers:

> (g) Make, approve, or disapprove any appropriation, contract, expenditure, or loan, the creation of any new position, or the filling of any vacancy in a position by any appointing authority
>
> (j) Reject, modify, or terminate 1 or more terms and conditions of an existing contract.
>
> (k) After meeting and conferring with the appropriate bargaining representative and, if in the emergency manager's sole discretion and judgment, a prompt and satisfactory resolution is unlikely to be obtained, reject, modify, or terminate 1 or more terms and conditions of an existing collective bargaining agreement.

Each of the above powers, which are implicated in this action, expressly allowed the Emergency Manager to modify existing contracts—i.e. contracts that were already vested. As such, the enabling statute, as well as EO 225, both expressly allowed the EO's Order to be retroactive. This Court should reverse the Court of Appeal's holding to the contrary.

b. UNDER *LAFONTAINE*, A "STATUTE" IS NOT "RETROACTIVE" SIMPLY BECAUSE IT RELATES TO AN ANTECEDENT EVENT

Lafontaine also held that ". . . a statute is not regarded as operating retroactively merely because it relates to an antecedent event." *Lafontaine, supra at* 85-86. This is the exact situation implicated in this Appeal.

The *Lafontaine* case involved a 2010 amendment to the Motor Vehicle Dealer Act. In that case, when LaFontaine and Chrysler entered into a dealership agreement in 2007, the MVDA limited manufacturers' right to establish a dealership within the relevant market area of existing dealers of the same line of vehicles, which was

defined as being within six miles; however, in August 2010, the MVDA was amended by PA 139 of 2010 to extend the six-mile radius to nine miles. The issue in the Court of Appeals was whether the legislature intended this law of general applicability to be incorporated into existing contracts. The Supreme Court answered this question in the negative.

In this case, however, there is no law of general applicability. Rather, the Emergency Manager issued an Order that *related only to the contract in question in this lawsuit;* stated differently, the Order specifically addressed an antecedent event—*the* Contract. In this case, there is no confusion whether the Emergency Manager wanted his Order to apply to the Contract in question. And, as such, EO 225 was proper under *Lafontaine*.

3. CONST 1963, ART 9, § 24 DOES NOT APPLY TO HEALTH BENEFITS

Article 9, § 24 of the Michigan Constitution provides:

> The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby. Financial benefits, annual funding. Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.

The above constitutional provision applies to pension plans and retirement systems, not health benefits. This Court recently addressed this precise issue. In *Studier v Mich*

Pub Sch Emples Ret Bd, 472 Mich 642, 658-659; 698 NW2d 350 (2005), this Court succinctly held as follows:

> [W]e hold that health care benefits are not protected by Const 1963, art 9, § 24 because they neither qualify as "accrued" benefits nor "financial" benefits as those terms were commonly understood at the time of the Constitution's ratification and, thus, are not "accrued financial benefits."

See also, AFT Michigan v State of Michigan (On Remand), 315 Mich App 602, 626; 893 NW2d 90, 101 (2016), app gtd sub nom. *AFT Michigan v State*, 895 NW2d 539 (Mich 2017)(citing *Studier* and holding that "employees have no vested right to retirement healthcare benefits.")

a. Application of Stare Decisis

In *Dickerson v United States*, 530 US 428; 120 SCt 2326; 147 LEd2d 405 (2000), Chief Justice Rehnquist wrote:

> Whether or not we would agree with *Miranda's* reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now. While "'*stare decisis* is not an inexorable command,'" particularly when we are interpreting the Constitution, "even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.'" [*Id.* At 443, 120 SCt 2326 (citations omitted).]

Even if *Studier* were wrongly decided that, by itself, does not necessarily mean that overruling it is appropriate because municipalities have been relying upon *Studier* for twelve years. *Robinson v Detroit*, 462 Mich 439, 465; 613 NW2d 307 (2000). Generally, in order to "avoid an arbitrary discretion in the courts, it is indispensable

that [courts] should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them[.]" The Federalist No. 78 (Hamilton) (Rossiter ed., 1961), p. 471. Indeed, under the doctrine of stare decisis, "principles of law deliberately examined and decided by a court of competent jurisdiction should not be lightly departed." *Brown v Manistee Co Rd Comm*, 452 Mich 354, 365; 550 NW2d 215 (1996), overruled on other grounds by *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007) (citation and quotation marks omitted). "However, stare decisis is not to be applied mechanically to forever prevent the Court from overruling earlier erroneous decisions determining the meaning of statutes." *Robinson*, 462 Mich at 463; 613 NW2d 307. Instead, courts should review whether the decision defies practical workability, whether reliance interests would work an undue hardship were the decision to be overruled, and whether changes in the law or facts no longer justify the decision. *Id*. At 464, 613 NW2d 307.

In *Studier*, this Court decided an important question: whether Article 9, § 24 applies to health benefits—as opposed to financial benefits. This rule did not create practical unworkability. To the contrary, the interpretation set forth is clear and easy to apply. Since this Court's decision, the State of Michigan and numerous municipalities have relied upon *Studier* in resolving financial emergencies. Such reversal would have dangerous consequences for municipalities that have recently removed themselves

from insolvency. For example, the State of Michigan, the City of Taylor, the City of Detroit, Hamtramck, Flint, and Pontiac—among others—have recently addressed retiree healthcare. *See, Kaminski v Coulter*, No. 16-1768, 2017 WL 3138308, at *1 (CA 6 July 25, 2017); *Serafino v City of Hamtramck*, No. 14-14112, 2016 WL 5390857, at *1 (ED Mich September 27, 2016). This is a strong reliance interest that would be upended by a reversal of *Studier*.

b. Studier Was Correctly Decided

This Court's previous interpretation of art 9, § 24 was correct. This Constitutional provision applies only to "accrued financial benefits." (emphasis added.)

At the time that the 1963 Constitution was ratified, the term "accrue" was commonly defined as "to increase, grow," "to come into existence as an enforceable claim; vest as a right," "to come by way of increase or addition: arise as a growth or result," "to be periodically accumulated in the process of time whether as an increase or a decrease," "gather, collect, accumulate," *Webster's Third New Int'l Dictionary* (1961), p. 13, or "to happen or result as a natural growth; arise in due course; come or fall as an addition or increment," "to become a present and enforceable right or demand," *Random House American College Dictionary* (1964), p. 9. *Studier v Michigan Pub Sch Employees' Ret Bd*, 472 Mich 642, 653; 698 NW2d 350, 357 (2005). As this Court explained, "according to these definitions, the ratifiers of our

Constitution would have commonly understood 'accrued' benefits to be benefits of the type that increase or grow over time-such as a pension payment or retirement allowance that increases in amount along with the number of years of service a public . . . employee has completed." *Id.* Health care benefits, however, are not benefits of this sort. Simply stated, they are not accrued.

Moreover, health care benefits do not qualify as "financial" benefits. At the time Const. 1963, art. 9, § 24 was ratified, the term "financial" was commonly defined as "pertaining to monetary receipts and expenditures; pertaining or relating to money matters; pecuniary," *Random House, supra,* p. 453, or "relating to finance or financiers," *Webster's, supra,* p. 851, and "finance" was commonly defined as "pecuniary resources, as of ... an individual; revenues," *Random House, supra;* accord *Webster's, supra.* "Pecuniary," in turn, was commonly defined as "consisting of or given or extracted in money," or "of or pertaining to money." *Random House, supra,* p. 892; accord *Webster's, supra,* p. 1663. *Id.* at 655. Accordingly, the ratifiers of our Constitution would have commonly understood "financial" benefits to include only those benefits that consist of monetary payments, and not benefits of a nonmonetary nature such as health care benefits.

CONCLUSION

This Court's previous interpretation of Const. 1963, art. 9, § 24 was correct and should not be overruled.

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